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Bonnie K. Tingey v. Lu Ann Christensen, Barr Christensen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BONNIE K. TINGEY, Plaintiff-Appellant, -v- LU ANN CHRISTENSEN and BARR CHRISTENSEN, Defendants-Appellees.	:	REPLY BRIEF OF PLAINTIFF-APPELLANT BONNIE K. TINGEY Priority No. 15 Case No. 960791-CA

APPEAL FROM FINAL ORDER AND JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
(HONORABLE FRANK G. NOEL)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

Cases

Rules

I. INTRODUCTION

Ms. Tingey submits this Brief in reply to the Brief of the Christensens. Ms. Tingey stands by her analysis of Utah law, and its application to the instant dispute, set forth in her Opening Brief. She seeks to refrain from repeating the arguments, regarding the correctness of which she remains confident, that are set forth in that Opening Brief, and to limit this Reply Brief essentially to the parts of the Christensens' analysis, and non-analysis, that may fairly require reply.

II. ARGUMENT

A. THE CHRISTENSENS HAVE FAILED SATISFACTORILY TO COUNTER MS. TINGEY'S CONTENTION THAT THE APPROPRIATE SUFFICIENCY-OF-THE-EVIDENCE STANDARD OF REVIEW IS WHETHER THE EVIDENCE IN SUPPORT OF THE VERDICT WAS SO SLIGHT AND UNCONVINCING AS TO MAKE THE VERDICT PLAINLY UNREASONABLE AND UNJUST.

The Christensens appear to be asking this Court to apply, to Ms. Tingey's contention that there was, under Rule 59(a)(6) of the Utah Rules of Civil Procedure, insufficient evidence to support the jury's tiny damage verdict, a standard of appellate review that may by now have been superseded by more recent case law. The most recent case, of the six (total) cited by the Christensens in their Brief, is a 1981 case.

The Christensens say nothing about the following standard, announced by the Utah Supreme Court in Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982), restated by the Utah Supreme Court in Sharp v. Williams, 915 P.2d 495 (Utah 1996), and set forth at page 15 of Ms. Tingey's original Brief:

The trial court's denial of a motion for a new trial will be reversed

> only if the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.

(Emphasis added.)

Nor do the Christensens acknowledge that, in Bodon v. Suhrmann, 327 P.2d 826 (Utah 1958), their own lead case, the Utah Supreme Court reversed the trial court's denial of a motion for a new trial in a case where the damages award was plainly so low as to be palpably unjust. Indeed, when the evidence of this case, as marshalled and explained by Ms. Tingey in her Opening Brief at 17-35; 39-43, is fully understood, the following language from Bodon (quoted by the Christensens themselves, in their Brief at 5) appears to apply to the instant situation:

> [W]hen the verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it should not be permitted to stand, and if the trial court fails to rectify it, we are obliged to make the correction on appeal.

The circumstances of this case also seem to fit, for what it's worth and in the event that this Court determines to apply such a rule, the "no proper relation to the wrong suffered" damages assessment-review test set forth long ago by the Utah Supreme Court in Chatelain v. Thackeray, 100 P.2d 191 (Utah 1940) (quoted at greater length in Ms. Tingey's Opening Brief at 14; see also the Chatelain court's reference, there highlighted, to the jury's disregarding or misconceiving the evidence or the trial court's instructions).

As stated in Ms. Tingey's Opening Brief, at 16, this Court, in reviewing Ms. Tingey's contention that she is entitled to a new trial, is not constrained by the "any

basis in the evidence" standard that is applied to motions for judgment notwithstanding the verdict. If this Court determines that, in the totality of the circumstances, the evidence was so slight and unconvincing as to make the verdict plainly unreasonable and unjust, it should reverse the District Court's denial of Ms. Tingey's Motion for a New Trial on Damages. The Christensens have not contested that basic proposition, and this Court should review the evidence with that principle in mind.

B. ALMOST ALL OF THE EVIDENCE CITED BY THE CHRISTENSENS AS SUPPORT FOR THE LOW DAMAGES AWARD, LIKE THE EVIDENCE ARGUABLY IN SUPPORT OF THE VERDICT MARSHALLED BY MS. TINGEY, IS INCONSEQUENTIAL, AND THE ONLY EVIDENCE TRULY IN SUPPORT OF THE VERDICT IS OVERWHELMED BY EVIDENCE TO THE CONTRARY.

Most of the pieces of evidence brought to this Court's attention by the Christensens, in their spare recitation of the evidence (set forth at 6-11 of their Brief), is, when understood in context, rationally inconsequential. For example, the fact that there was no visible damage to the Tingey vehicle is meaningless. No person, lay or expert, linked vehicular damage, or the lack thereof, to likely or unlikely injury or exacerbation of pre-existing condition to the occupant of the Tingey vehicle. In a similar vein, it is of utterly no consequence that LuAnn Christensen was, at the scene of the accident, unaware of the fact that Ms. Tingey's vehicle had been involved in the collision. Nor is there any true evidentiary significance to the testimony of Ms. Tingey's surgeon, Dr. Austin, that ligamentous damage "can be" caused by long-term stress as well as trauma. Nor is there any true significance to his testimony that there are discussions in the academic world that

whiplash is not one of the mechanisms that can cause TMJ problems. Nor is there significance to the fact that Ms. Tingey did not consult with Dr. Austin until four months after the accident. Nor is there outcome-relevant significance, when the issues in this case (having to do with the exacerbation of pre-existing conditions and the onset, symptomatically, of a new condition (Ms. Tingey's temporomandibular joint problems)), are accurately understood, to the fact that Ms. Tingey had been involved in other motor vehicle collisions. Nor is there true significance to the fact that Ms. Tingey had been referred to the University of Utah Pain Clinic prior to the time of the subject collision, for chronic pain that existed prior to the time of the subject collision. Nor is there true significance to the fact that Ms. Tingey had described her pain, on a form provided by the Pain Clinic, by checking the pain-related adjectives referenced in the Christensens' Brief at 8. Nor is there true significance to the fact that Ms. Tingey's foot doctor, James MacIntyre, M.D., testified as indicated at pages 8-9 of the Christensens' Brief.[1]

When all the evidence is understood, the only bits, of those brought to the Court's attention by the Christensens, that seem arguably to have any weight in support of the minuscule verdict are the following statements from the Christensens' hired experts, both discussed at page 7 of the Christensens' Brief: (a) Dr. Crayton Walker's trial testimony that he doubted that the subject collision significantly contributed to Ms. Tingey's temporomandibular joint problems; and (b) the testimony of Scott McClellan,

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[1]Ms. Tingey acknowledges that there was sufficient evidence for the jury to reject her contention that she had suffered a significant foot injury in the collision and that aspect of her claims is not being pursued in this Appeal.

the Christensens' biomechanical engineer, to the effect that the daily activities of Ms. Tingey's life put significantly more force on her temporomandibular joints than did the forces involved in the subject collision.

As pointed out in Ms. Tingey's Opening Brief at 33, Dr. Walker arguably opined, in his independent medical examination that was part of Ms. Tingey's trial Exhibit 7[2] (see Addendum to Ms. Tingey's Opening Brief at 17), that the damage to Ms. Tingey's temporomandibular joints "is most likely a direct result from her ... automobile accident[s] in 1989, 1990 and 1993 [the subject collision]." (Emphasis added.) Dr. Walker also testified, at trial, as discussed in Ms. Tingey's Opening Brief at 34, that he agreed with everything stated by Dr. Corey Anden (the author of an independent medical examination report (see, especially, the "conclusions" set forth at page 10 of the Addendum to Ms. Tingey's Opening Brief)), other than that the subject collision was the sole cause of Ms. Tingey's jaw pain. Dr. Walker thus, for purposes pertinent to this Appeal and for purposes of understanding the overall weight of the evidence, arguably nullified, by the above-referenced trial testimony, his opinion that the subject collision had no significant impact on Ms. Tingey's jaw condition. He also thus unequivocally agreed with the mountain of evidence (please see Ms. Tingey's trial Exhibit 7, copies of many of the contents of which are reproduced in the Addendum to Ms. Tingey's Opening Brief and discussed in her Opening Brief at 23-24), not only from Dr. Anden but from numerous

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[2]Exhibit 7 is the compilation of health care records which, along with the Christensens own (Exhibit 21) compilation of health care records, Ms. Tingey urges this Court to scrutinize.

other medical doctors, that Ms. Tingey's pre-existing conditions were significantly exacerbated by the subject collision.

It is important to note, with respect to Mr. McClellan's testimony, that he did not offer any opinion with respect to Ms. Tingey's condition. As explained at page 35 of Ms. Tingey's Opening Brief, Mr. McClellan testified that he was not diagnosing Ms. Tingey and that he makes no claims in that area. Mr. McClellan also testified, as explained on that same page of Ms. Tingey's Opening Brief, that only Ms. Tingey knows what pain she's sensing, and at what times, and that he's not an expert on TMJ problems.

It is important to understand that neither Dr. Walker nor Mr. McClellan said anything, however their testimony about Ms. Tingey's temporomandibular joint problems may be weighed, contrary to the consistent (see Ms. Tingey's trial Exhibit 7 and the numerous documents set forth in the Addendum to Ms. Tingey's Opening Brief) reports from treating physicians to the effect that her pre-existing condition was substantially exacerbated by the subject collision. This Court may somehow determine, contrary to Ms. Tingey's contention and contrary to the clear weight of the evidence, that there was sufficient evidence to support the jury's apparent determination that her temporomandibular joint problems were not caused or "lit up" by the subject collision and still agree with her contention that there was utterly no evidence of any weight at all (if, indeed, any evidence whatsoever) to support the jury's apparent determination that her pre-existing condition was not substantially exacerbated by the subject collision. From any reasonable perspective, the jury's award of emergency room expenses only, incurred on the day of the subject

collision, and the jury's nominal award of $1.00 for general damages, cannot be reconciled with the evidence that Ms. Tingey had suffered a significant aggravation of her pre-existing conditions (occipital headaches and neck, shoulder, and low-back problems).

Ms. Tingey urges this Court, as she did in her Opening Brief, to peruse the record of this case, to understand all the evidence (oral testimonial evidence as well as the voluminous health care records that were admitted into evidence for all purposes). She is confident that this Court will determine, once that exercise has been undertaken, that the result reached by the jury (which can only be reconciled with the implicit determination that the subject collision caused her only nominal, fleeting pain and caused her to sustain only the approximately $1,400.00 of expenses she incurred on the very day of the subject collision (as opposed to any substantial part of the $33,000.00-plus in health care expenses she incurred subsequent to the subject collision)) was flatly erroneous, unjust, and unlawful.

The evidence in support of the jury's verdict was so slight and unconvincing as to make it plainly unreasonable and unjust, and it was outside the limits of any reasonable appraisal of damages. This Court should reverse and remand on the basis of insufficiency of the evidence to support the verdict.

C. THE CHRISTENSENS HAVE NOT EVEN ATTEMPTED, IN ANY MEANINGFUL WAY, TO CONTEST THE PROPOSITION THAT THE DISTRICT COURT COMMITTED REVERSIBLE ERRORS OF LAW.

Notably lacking from the Christensens' analysis is any substantive contesting of the proposition, set forth and discussed in Ms. Tingey's Opening Brief at 43-49, that the

District Court committed reversible errors of law with respect to its refusal to give Ms. Tingey's proposed instruction No. 27, its ruling that actual payments be required to support her claims for lost household services, and its allowing the jury to be informed that her husband is a lawyer. Rather than contesting the arguments, made by Ms. Tingey in her Opening Brief, that the District Court erred in connection with those rulings, the Christensens seem to be asking this Court simply to shrug off those rulings, in conclusory fashion, and to ask this Court to assume that if such errors were committed, it really didn't matter because of the supposed sufficiency of the evidence to support the verdict. Ms. Tingey respectfully suggests that those claims of error are separate aspects of her Appeal that deserve to be treated on their own merits, especially if, for some reason, this Court determines to reject her Rule 59(a)(6) contention that the verdict was not supported by the evidence or was "against law" (the law laid out in the jury instructions on damages; see brief discussion set forth at page 37 of Ms. Tingey's Opening Brief). Ms. Tingey stands by her analysis of those errors of law, and their significance, discussed in her Opening Brief.

D. MISCELLANEOUS ERRONEOUS STATEMENTS AND ANALYSIS PLAGUE THE CHRISTENSENS' BRIEF.

Ms. Tingey replies, as follows, to miscellaneous misstatements and erroneous analysis (in addition to those things that are discussed hereinabove) that appear in the Christensens' Brief.

1. The Christensens appear to miss the boat with respect to the significance of the District Court's refusal to give Ms. Tingey's proposed Jury Instruction

No. 27. The significance of that proposed Instruction is that it would have informed the jury that, if the jury could not, after trying to do so, apportion the damages between the subject collision and Ms. Tingey's pre-existing condition, it was duty-bound to determine that all of her damages were caused by the latest incident (the subject collision). Please see analysis of the basis for that kind of instruction set forth at 44-46 of Ms. Tingey's Opening Brief. The following statement by the Christensens, appearing at page 3 of their Brief, is utterly unsupportable, in law or in logic:

> That jury instruction would have required the jury to apportion Ms. Tingey's damages between all of the accidents and any other causes. Appellees state that is exactly what the jury did.

The point is, of course, that it will never be absolutely known why the jury did what it did or whether the requested Instruction, if deemed by this Court to be appropriate, would have altered the outcome. It may be that the jury was not able to determine or chose not to try to determine what damages (other than the immediate emergency room charges) were caused and were not caused by the subject collision. The overwhelming weight of the evidence, as stated hereinabove and in Ms. Tingey's Opening Brief, should have made clear, to a fair-minded, attentive, non-confused jury, even without the Instruction in question, that Ms. Tingey had suffered substantial damages in the subject collision. The proposed Instruction in question (as pointed out in Ms. Tingey's Opening Brief at 44, an essentially identical instruction was proposed by the Christensens themselves) is apparently tailor-made for this kind of situation, and it cannot be fairly said that its inclusion would not likely have made a substantial difference in the outcome. The

Christensens' statement that the jury apportioned damages appropriately is non-responsive to Ms. Tingey's contention and misses the point of the appropriateness of the giving of an instruction of the kind sought. This Court should also especially consider the significance of the District Court's refusal to give the proposed Instruction when both sides wanted it, in substance, to be given.

2. The Christensens' statement, appearing at the top of page 6 of their Brief, that there were "sections in each of [Ms. Tingey's] witnesses' testimony that did not support the claims made by [Ms. Tingey]" is incorrect and not supported by the analysis set forth in the Christensens' Brief. Their Brief does not even mention the testimony of Ms. Tingey's treating Pain Clinic physician, Dr. Bradford Hare (discussed at 27-28 of Ms. Tingey's Opening Brief); the testimony of the investigating police officer, Craig Young (discussed at page 28 of Ms. Tingey's Opening Brief); the testimony of Ms. Tingey's friend and neighbor, Laurie Little (discussed at pages 28-29 of Ms. Tingey's Opening Brief); or the testimony of Robert Tingey, Ms. Tingey's husband (discussed at page 30 of Ms. Tingey's Opening Brief).

3. The Christensens fail to acknowledge, when discussing Dr. Walker's testimony, at page 7 or elsewhere in their Brief, the fact, discussed at page 24 of Ms. Tingey's Opening Brief, that Dr. Walker's description of the "psychological profile" (Dr. Walker is not a psychologist) of Ms. Tingey was substantially undercut by the fact that he testified that Ms. Tingey had had no significant objective findings of injuries prior to the time of the subject collision but that the records of one of Ms. Tingey's physicians,

Dr. Thoen (which Dr. Walker claimed to have reviewed; R. at 684, 686-88), showed that Ms. Tingey had indeed experienced, prior to the subject collision, a herniated cervical disc that had caused objective spasming, as well as a central focal lumbar disc herniation.

4. Although Ms. Tingey's foot injury claim is not, as explained in footnote 1, *supra*, being pursued in this Appeal, Ms. Tingey feels constrained to point out that the statement appearing at page 8 of the Christensens' Brief that, if her foot had been injured in the accident, it would not have been possible for her to walk three miles a day within a month or two of the time of the subject collision, is wrong. There is utterly no scientific or record support for that naked assertion, and the fact that she was able to do so may simply speak well of her character and her desire to get on with her life.

5. Also erroneous is the Christensens' apparent contention that the only way that a damages award, high or low, can be successfully attacked on appeal is on the basis of passion or prejudice (see analysis appearing in Christensens' Brief at 9-10). As explained in Ms. Tingey's Opening Brief at page 37, Rule 59(a)(6) considerations of insufficiency of the evidence to justify the verdict (apart from and analytically separate from Rule 59(a)(5) passion or prejudice considerations) can form a sufficient basis on which to set aside a damage award, high or low. Crookston v. Fire Ins. Exchange, 817 P.2d 789, 803 (Utah 1991). This Court may, in any event, infer verdict-significant

prejudice if it is of the view that the District Court's unnecessary and inappropriate allowing of the jury to hear that Ms. Tingey's husband was a lawyer was erroneous.[3]

6. The Christensens' statement, at page 11 of their Brief, that Ms. Tingey contended that the subject collision caused her to incur over $33,000.00 in medical expenses is not correct. As pointed out in her Opening Brief at 24-25, there was evidentiary significance to the fact that Ms. Tingey had incurred only $1,000.00 or so for health care expenses in the aftermath of her 1989 automobile collision, only approximately $11,000.00 in the aftermath of her 1990 collision, and in excess of $33,000.00 in the aftermath of the subject collision. Those were facts which, Ms. Tingey contends, should, along with the other evidence presented, have caused an attentive, conscientious jury

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[3]Instructive on this subject are the Utah Supreme Court's following observations in Stamp v. Union Pacific R. Co., 303 P.2d 279, 280-281 (Utah 1956):

> We are convinced that the verdict here was most excessive. In fact, to suggest that such an award could be in any remotely related to plaintiff's injuries is to ignore facts. It is inconceivable that the jury could have made such an award under the facts here presented, without having been motivated by passion or prejudice.

There is no reason for this Court to analyze "excessive" jury verdicts in a manner different from its analysis of woefully small verdicts. The Stamp court also worded the standard for setting aside damages verdicts as follows:

> ... where there is an award obviously above any reasonable appraisal of the damages suffered, which may have resulted from misconception of evidence, or error in judgment, or undue liberality to the extent that the court in fairness and justice cannot permit the award to stand in the amount given.

Id. at 283.

reasonably to conclude that Ms. Tingey had suffered significant exacerbation of her pre-existing condition and her new TMJ condition as results of the subject collision. Ms. Tingey never suggested, however, through her evidentiary presentation, her oral argument, or otherwise, that all of that $33,000.00-plus figure was necessitated as a result of the subject collision.

E. THE CHRISTENSENS HAVE NOT EVEN ATTEMPTED TO COUNTER SOME OF THE STRONGEST POINTS SET FORTH IN MS. TINGEY'S OPENING BRIEF.

Noticeably lacking from the Christensens' Brief is any attempt to deal with some of the most telling facts of this case. A sampling of this aspect of the case follows:

1. The Christensens do not dispute the fact, or the significance of the fact, mentioned at 6-7, 38, and at 49 of Ms. Tingey's Opening Brief, that $35,000.00 was offered, on their behalf, to settle this clear liability case.

2. The Christensens say nothing about the jury's note (evidencing its confusion) discussed at 8-9 (footnote 2) of Ms. Tingey's Opening Brief and reproduced at 1 of the Addendum to her Opening Brief.

3. The Christensens say nothing about the number and quality of narrative reports set forth in Ms. Tingey's Trial Exhibit 7, reproduced in the Addendum to her Opening Brief, and discussed at 23-24 of Ms. Tingey's Opening Brief, from treating health care providers and independent medical examiners, attesting to the substantial exacerbation of pre-existing conditions and the onset of temporomandibular joint pain and the need for surgery as results of the subject collision. Nor do they say anything about the

relatively very high amount of health care expenses incurred after the subject collision as opposed to after the earlier collisions.

4. The Christensens say nothing about the fact that Ms. Tingey had never complained of jaw pain, to any health care provider, prior to the subject collision (see, *e.g.,* Ms. Tingey's Opening Brief at 23, 27).

5. The Christensens say nothing about the fact that the University of Utah Pain Center, to which Ms. Tingey was admitted only after the subject collision, prescribed anti-depressant medication for her, and that there is no evidence that she had ever been prescribed any anti-depressant dose of medication prior to the time of the subject collision (see Ms. Tingey's Opening Brief at 28).

6. The Christensens say nothing about the uncontroverted testimony from witness Laurie Little (a nurse by profession), that she had seen a serious decline in Ms. Tingey's health since the time of the subject collision (see Ms. Tingey's Opening Brief at 28-29).

7. The Christensens say nothing in opposition to the proposition (this has to do with the District Court's jury instructions on household services discussed in Ms. Tingey's Opening Brief at 46-47) regarding the testimony of Ms. Tingey's economic loss expert, Alan Stephens, that household services have an intrinsic value, regardless of whether out-of-pocket costs are incurred to pay for the value of the loss of those services (see Ms. Tingey's Opening Brief at 29-30).

8. The Christensens say nothing in response to Ms. Tingey's own testimony, and the uncontroverted fact, that the TMJ surgery she underwent subsequent to the subject collision is the only surgery that she has undergone to treat any injuries she has suffered in any of her motor vehicle collisions (this is discussed at page 32 of Ms. Tingey's Opening Brief).

9. The Christensens say nothing in response to the fact that their own Dr. Walker acknowledged that he had seen nothing in Ms. Tingey's records about the existence of jaw pain or temporal pain prior to the time of the subject collision, even though he had characterized Ms. Tingey as a person whose "complaints of pain are out of proportion to her physical findings" (this is discussed at page 33 of Ms. Tingey's Opening Brief).

10. The Christensens say nothing about the proposition, set forth at page 42 of Ms. Tingey's Opening Brief, that it defies logic and is contrary to the "sufficient evidence" principle of Rule 59(a)(6) for the inference fairly to be drawn that it was a mere coincidence that Ms. Tingey (who had, by then, lived for more than 14,000 days) experienced, within a few days subsequent to the subject collision, jaw pain for the first time in her life.

III. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Ms. Tingey should not remain penalized in this litigation by virtue of the fact that she had, through no fault of her own, been injured in previous vehicular collisions. For the reasons set forth hereinabove and (with greater particularity, factual

discussion, and legal analysis) in her Opening Brief, and in the interest of justice, Ms. Tingey urges this Court to reverse and remand for a new trial on damages with instructions consistent with its resolution of the evidentiary and jury instruction issues discussed hereinabove and in her Opening Brief.

RESPECTFULLY SUBMITTED this 17th day of September, 1997.

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Attorneys for Bonnie K. Tingey

CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of September, 1997, I caused to be served two true and correct copies of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT BONNIE K. TINGEY by the method indicated below, and addressed to the following:

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